Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy

FEDERAL COURT (KUALA LUMPUR) — APPEAL NO 02–289–93
MOHAMED AZMI, PEH SWEE CHIN AND WAN ADNAN FCJJ
7 APRIL 1995

***Contract** — Damages — Liquidated damages — Failure to pay instalments due after several payments made — Clause in contract provided that aggrieved party entitled to forfeit all money paid to date of breach — Sum paid included deposit paid upon signing of agreement — Whether aggrieved party could forfeit money — Whether penalty — Whether proof of actual damage required — Contracts Act 1950 s 75*

***Contract** — Deposit — Forfeiture — Breach of contract — Whether deposit forfeitable per se — Whether court must determine if amount is reasonable — Contract Act 1950 s 75*

Both the appellant and respondent in this case are medical practitioners.The appellant entered into an agreement in writing ('the agreement') with the respondent whereby the respondent sold his clinic to the appellant for a total purchase price of RM120,000. Pursuant to the agreement, the appellant paid to the respondent RM12,000 on signing the agreement, and thereafter paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly instalments of RM4,000 each. However, at the stage when the appellant had paid up to a total sum of RM96,000 towards the total purchase price, he refused to go on paying the remaining six monthly instalments. The respondent sought to forfeit the RM96,000 by relying on a clause in the agreement which in effect, provided that if the appellant defaulted, all moneys paid to date of such breach would be forfeited absolutely to the respondent as agreed liquidated damages, and the agreement would be terminated. The respondent successfully obtained a declaration from the High Court that the clause was valid and enforceable. The appellant appealed.

Held, allowing the appeal in part by ordering the respondent to refund the sum of RM84,000 to the appellant:

(1) In Malaysia, there is no distinction between liquidated damages and penalties as understood under English law, in view of s 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby' ('the words in question').

(2) However, the words in question must be given a restricted construction. Hence, despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v Baxendale* (1854) 9 Exch 341; [1843–60] All ER Rep 461. Any failure to prove such damages will result in the refusal of the court to award such damages.

(3) However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play. In any event, the damages awarded must not exceed the sum so named in the contractual provision.

(4) The instant case falls into the category of cases where damages could be proved by settled rules. The respondent could have proved the actual loss of, for example, use of the medical equipment in the clinic, but failed to do so. Therefore, the court could not quantify any award of damages to him.

(5) In any event, apart from the real loss that had not been proved, the respondent was entitled to forfeit a reasonable amount of the deposit. The sum of RM12,000 was not too large to prevent it from being fully forfeitable. Accordingly, the respondent had to refund the sum of RM96,000 less the deposit to the appellant.

[Bahasa Malaysia summary

Kedua-dua perayu dan responden dalam kes ini adalah pengamal perubatan. Perayu telah mengikat suatu perjanjian bertulis ('perjanjian tersebut') dengan responden di mana responden telah menjual kliniknya kepada perayu bagi jumlah harga belian sebanyak RM120,000. Mengikut perjanjian tersebut, perayu membayar kepada responden jumlah RM12,000 apabila menandatangani perjanjian tersebut, dan selepas itu membayar jumlah selanjutnya sebanyak RM48,000. Baki sejumlah RM60,000 perlu dibayar melalui 15 bayaran ansuran, setiapnya berjumlah RM4,000. Bagaimanapun, pada peringkat apabila perayu telah membayar RM96,000 terhadap jumlah harga belian, beliau enggan untuk meneruskan enam bayaran ansuran yang tertinggal. Responden cuba melucuthakkan RM96,000 tersebut berlandaskan suatu fasal di dalam perjanjian tersebut yang secara keseluruhannya, memperuntukkan bahawa jika perayu ingkar, kesemua wang yang telah dibayar sehingga tarikh kemungkiran perjanjian tersebut akan dilucuthakkan kepada penentang sebagai ganti rugi jumlah tertentu yang dipersetujui, dan perjanjian tersebut akan ditamatkan. Responden berjaya mendapatkan suatu deklarasi dari Mahkamah Tinggi bahawa fasal itu adalah sah dan boleh dikuatkuasakan. Perayu telah membuat rayuan.

Diputuskan, membenarkan sebahagian rayuan tersebut dengan memerintahkan supaya responden mengembalikan wang berjumlah RM84,000 kepada perayu:

(1) Di Malaysia, tidak terdapat perbezaan di antara ganti rugi jumlah tertentu dengan penalti, sepertimana yang terdapat di bawah undang-undang Inggeris, melihatkan s 75 Akta Kontrak 1950

yang memperuntukkan bahawa dalam setiap kes, mahkamah mesti menentukan apa yang merupakan pampasan yang munasabah, 'sama ada kerosakan atau kerugian sebenar yang disebabkan olehnya telah dibuktikan atau tidak' ('perkataan yang berkenaan').

(2) Namun demikian, perkataan yang berkenaan mesti diberi pentafsiran yang terhad. Oleh itu, meskipun perkataan yang berkenaan, seorang plaintif yang menuntut ganti rugi sebenar di dalam suatu tindakan bagi kemungkiran kontrak masih perlu membuktikan kerosakan sebenar atau pampasan yang munasabah menurut rukun mantap di dalam *Haxley v Baxendale* (1854) 9 Exch 341; [1843–60] All ER Rep 461. Sebarang kegagalan untuk membuktikan kerosakan sedemikian akan mengakibatkan keengganan mahkamah untuk membuat award ganti rugi sedemikian.

(3) Walau bagaimanapun, bagi kes di mana mahkamah mendapati susah untuk mentaksir ganti rugi untuk kerosakan sebenar oleh kerana tidak terdapat cara penyukatan ganti rugi yang diketahui yang boleh digunakan, tetapi keterangan pula menunjukkan dengan jelasnya bahawa memang terdapat suatu kerugian sedia ada yang bukan di luar dugaan, perkataan yang berkenaan akan terpakai. Mahkamah patut mengawardkan ganti rugi yang substantial dan bukan nominal, yang munasabah dan adil mengikut akal budi mahkamah.

(4) Kes ini jatuh ke dalam kategori kes di mana kerosakan boleh dibuktikan berdasarkan rukun-rukun yang mantap. Responden harus boleh membuktikan kerugian sebenar, misalnya, kegunaan alat-alat perubatan di dalam klinik, tetapi gagal berbuat demikian. Oleh itu, mahkamah tidak dapat menyatakan kuantiti untuk sebarang award ganti rugi kepadanya.

(5) Walau bagaimanapun, selain daripada kerugian sebenar yang tidak dibuktikan, responden berhak untuk melucuthakkan sejumlah deposit yang munasabah. Deposit sebanyak RM12,000 itu tidak begitu besar jumlahnya untuk menghalangnya daripada dilucuthakkan dengan sepenuhnya. Dengan yang demikian, responden harus mengembalikan wang berjumlah RM96,000 tolak deposit tersebut kepada perayu.]

Notes

For cases on liquidated damages, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1467–1472.

For cases on forfeiture of deposit, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1497–1505.

Cases referred to

Bhai Panna Singh v Bhai Arjun Singh AIR 1929 PC179 (refd)

Chaplin v Hicks [1911] 2 KB 786; [1911–13] All ER Rep 224 (refd)

Davies v Galmoye (1888) 39 Ch D 323 (refd)
Fateh Chand v Balkishen Das [1964] 1 SCR 515; AIR 1963 SC 1405 (follld)
Hadley v Baxendale (1854) 9 Exch 341; [1843–60] All ER Rep 461 (refd)
Linggi Plantations Ltd v Jagatheeson [1972] 1 MLJ 89 (follld)
Maniam v The State of Perak [1957] MLJ 75 (follld)
Maula Bux v Union of India [1970] 1 SCR 928 (follld)
Wearne Brothers (M) Ltd v Jackson [1966] 2 MLJ 155 (refd)

Legislation referred to

Contracts Act 1950 s 75
Rules of the High Court 1980 O 28
Contract Act 1872 s 74 [Ind]

Appeal from: Originating Summons No 34–340–91 (High Court, Shah Alam)

RR Sethu (*HS Dhillon* with him) (*HS Dhillon & Co*) for the appellant.
AS Chandran (*Sri Dev Nair* with him) (*Ram, Rais & Partners*) for the respondent.

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): This appeal raises a difficult but important question of interpretation of s 75 of the Contracts Act 1950, which is set out below for ease of reference (s 75 is hereafter 'the section in question'):

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Both parties are medical practitioners. The respondent (hereafter 'the vendor'), sold his medical practice on certain terms and conditions under the name and style of 'Poliklinik dan Surgeri Thiager' to the appellant (hereafter 'the purchaser'), for a total price of RM120,000 and for this purpose they entered into an agreement in writing on 15 October 1988. The relevant parts of the agreement are set out below:

> The agreement made on this 15 October 1988 ...
>
> Whereas —
>
> Now this agreement witnesseth as follows:
>
> In consideration of the covenants, undertakings and payments set out hereinafter the parties mutually agree between themselves as follows:

(1) (a) The vendor shall sell the said premises free of all encrumbrances to the purchaser for the total of RM120,000 the payment terms being as follows:

(i) The purchaser shall pay to the vendor and hereby pays the vendor receipt of which the vendor hereby acknowledges by signing this agreement, the sum of RM12,000.

(ii) The purchaser shall pay the vendor the sum of RM48,000 on or by 27 October 1988.

(iii) The purchaser shall pay the vendor fifteen (15) equal monthly instalments of RM4,000 a month on or before the end of each month the first of which fifteen (15) payments is to commence on 30 November 1988.

(2) (a) The vendor as tenant shall continue to hold the tenancy as trustee for and on behalf of the purchaser till the expiry date of 30 November 1989 and if requested by the purchaser shall in accordance with the tenancy agreement renew the said tenancy. On the expiry of the extended period if there shall not be any clause for further extension, the vendor's obligation in this clause shall cease and the purchaser will have full liberty to negotiate a new tenancy but so long as there shall be extensions to the current tenancy the vendor shall continue to hold the same for and to the benefit of the purchaser and to act on the purchaser's instructions.

(b) Both parties represent to each other that they will not do anything to breach the terms of the tenancy and in the event of such breach occurring the party at fault shall and hereby ... fully indemnify the other party.

...

(15)(a) In the event the vendor shall default in his obligations herein the purchaser shall be entitled to specific performance in which event all the costs incurred shall be to the vendor's account.

(b) In the event the purchaser shall default in his obligations herein all moneys paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and thereupon this agreement shall be deemed null and void and the purchaser shall give up vacant possession of the said premises and shall give up the said practice to the vendor and shall have no further rights whatsoever.

Signed by the abovenamed)
Dr Thiagarajah a/l Retnasamy) —Sgd—
the said vendor in the presence)
of:

—Sgd—
KB Thuraisingham
Advocate & Solicitor
Kuala Lumpur

Signed by the abovenamed)
Dr Selva Kumar a/l Murugiah) —Sgd—
the said purchaser in the presence)
of:

—Sgd—
KB Thuraisingham
Advocate & Solicitor
Kuala Lumpur

The premises where the clinic is situated have, at all material times, belonged to a third party who had earlier granted a tenancy of the same to the vendor, who, after and under the agreement dated 15 October 1988, was 'to hold the tenancy as trustee for and on behalf of the purchaser ...', vide its cl 2 but the rent payable would be paid by the purchaser after the date of the said agreement to the vendor who would then in turn pay to the vendor's landlord.

RM12,000 was paid on the signing of the agreement by the purchaser who was to pay a further sum thereafter in pursuance of the agreement leaving some balance to be paid by fifteen monthly instalments of RM4,000 each. Subsequently, to cut the story short, thus, sometime before 22 December 1989, the purchaser refused to go on paying the monthly instalments, leaving six instalments unpaid (RM24,000), and by then, a sum of RM96,000 had been paid by the purchaser to the vendor towards the aforesaid purchase price of the clinic. At that time, the purchaser had also failed to reimburse the vendor the rent payable to the extent of RM4,808.

On 22 December 1989, the vendor wrote to the purchaser through his solicitors, terminating the said agreement, forfeiting the sum of RM96,000 and requiring the purchaser to hand over the medical equipment and vacant possession of the premises of the clinic.

The originating summons herein was subsequently filed, claiming declarations that the said agreement was terminated, that the vendor was entitled to forfeit the sum of RM96,000, that in regard to the tenancy which the vendor held in trust for the purchaser, such trust be terminated and that the vendor be entitled to resume vacant possession of the clinic.

Apart from the important interpretation of the section in question, there are several small points which may be very well briefly disposed of first.

The first of such small points is to the effect that the purchaser was induced to enter into the said agreement by the misrepresentation from the vendor about the average monthly income of the clinic from the source of the 'contract patients' being at RM5,000, but the purchaser alleged that the actual income earned was half of that sum. This bare allegation was made by the purchaser apparently in order to explain the refusal or reluctance to go on paying the aforesaid monthly instalments.

However, inter alia, no particulars at all were given in respect of such patients for the period from the date of the agreement in question. It was a mere allegation, equivocal, inconsistent, and insubstantial for reasons mentioned by the learned judge that compelled him to reject it. We are satisfied that the learned judge has not erred in doing so. We also reject such allegation.

Yet another mundane point is to the effect that the learned judge has failed at the outset to make an order under O 28 of the Rules of the High

Court 1980 to direct that the proceeding by the originating summons herein be continued as if it were begun by writ to determine the issue of misrepresentation.

The purchaser at the hearing before the learned judge was represented by counsel. He never raised this procedural point at all. An appellant could be barred from raising an objection to a point of procedure on appeal when such objection was not raised in the court below. Please see *Davies v Galmoye* (1888) 39 Ch D 323. By the same token, the purchaser as appellant, should be also barred from raising the procedural point in question, quite apart from the fact that this procedural point proved to be futile with hindsight.

It is also desirable to mention two other matters, viz that the question of arrears of rent has not been submitted on by both parties before us, and the court is therefore prepared to treat this as being no longer an issue before us, and that it was common ground in the court below that the purchaser began to fail to pay those monthly instalments towards the purchase price as from July 1989.

We now deal with the question of concern, ie the section in question; and the facts that call for its interpretation in this case are as follows. A total sum of RM96,000 was collected by the vendor from the purchaser to account of the total purchase price of the clinic, leaving a sum of RM24,000, the amount of six monthly instalments remaining unpaid. On 22 December 1989, the vendor wrote, inter alia, in effect, terminating the agreement, on the ground of failure to pay the balance of RM24,000, and stating that the said sum of RM96,000 had been forfeited absolutely as 'agreed damages'. This must have reference to cl 15 of the agreement as set out above.

We have long known the object for which the section in question was enacted first in India and later here in our country. Thomson J (as he then was) in *Maniam v The State of Perak* [1957] MLJ 75, commenting on arguments advanced before him as to whether a certain sum was to be regarded either as a penalty or as liquidated damages, said [at p 76]:

> In the first place, in this country there is no difference between penalty and liquidated damages. Section 75 of the Contract Ordinance which is the same as s 74 of the Indian Contract Act reads as follows:
>
> > 'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'
>
> As is said in *Pollock and Mulla on the Indian Contract Act* (7th Ed) at p 410, 'This section boldly cuts the most troublesome knot in the common law doctrine of damages'. In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty. See *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179.

It is obvious that any submission as to whether a certain clause in a contract is a penalty or liquidated damages is an exercise in futility.

Clause 15(b) of the agreement before us is therefore unenforceable and is to be regarded as a penalty, void in equity for being unconscionable. A

At common law, where there is no such section in question, the effect of a sum being found as a penalty, is therefore that the innocent party to a breach of contract is not left with no remedy, he can still recover damages or compensation which he has however to prove, and it is immaterial that such compensation if proved, exceeds or not, the stipulated penalty. B

However, the wording of the section in question seems to also differ from the common law on the aspect of proof of damages when a provision in a contract turns out to be a penalty. The relevant words in the section in question are: C

> ... the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive ... reasonable compensation not exceeding the amount so named or ... the penalty stipulated for.

D

(The quoted words will be hereafter 'the expression in question'.)

In particular, from the expression in question, the words, 'whether or not actual damage or loss is proved to have been caused thereby' (they are hereafter 'the words in question'), are unambiguous and plain, and by the primary rule of construction, ie literal construction of the same, they may seem to indicate clearly the dispensation of proof of actual damage or loss E by an innocent party to a breach of contract, and this seems to be a departure from the common law brought deliberately about by the legislature. Let us examine the acceptability of this construction. It is useful to bear in mind that there is no such thing as a fixed hierarchy of application of rules of construction in which the primary rule of literal F construction will be at the top of it.

In the first place, such a literal construction would seem to be beyond the object of the section in question, viz the abolition of the distinction between a penalty and liquidated damages; secondly, it will produce a most unreasonable result in that it will change the existing law G which is that if a plaintiff seeks to recover damages for the actual damage caused, he ought to prove them, unless he is content with the symbolic award, eg of nominal damages, for any infraction of his rights under a contract. This even seems to be a rule of some antiquity.

We hold first, that the literal construction should not be strictly adhered to and the words in question should be given a restricted or H limited construction though the language used in the words in question expresses really no circumscription of the area of operation.

Having decided on a more limited construction of those words in question, we must now revert, at least briefly, to the more important and relevant cases in our own courts and the Privy Council, and the Indian I Supreme Court to decide for ourselves how precisely the words in question should be construed.

In *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179, an Indian appeal in the Privy Council in connection with a provision in a contract for

the party in breach to pay Rs10,000, Lord Atkin said in connection with s 74 of the Indian Contract Act 1872 (corresponding to the section in question in our Act), held:

> The effect of s 74 of the Contract Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs10,000, whether the penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.

In that case, the plaintiffs managed to prove as their actual damage, the sum of Rs500 which they recovered.

Lord Hailsham in *Linggi Plantations Ltd v Jagatheeson* [1972] 1 MLJ 89 observed at p 92 that the section 'was intended to cut through the rather technical rules of English law relating to liquidated damages and penalties ...'.

In *Maniam v State of Perak* [1957] MLJ 75, the object of the section in question suggested by Pollock and Mulla, the joint authors of the *Indian Contract and Specific Relief Acts*, was repeated by Thomson J (as he then was) with approval as set out above, but unfortunately the section in question was found by his Lordship to be irrelevant to the facts of that case, and consequently there was no expounding on the words in question.

The view of Lord Atkin was adopted in our High Court case, viz *Wearne Brothers (M) Ltd v Jackson* [1966] 2 MLJ 155, though the learned trial judge, while correctly holding that in a provision in a contract amenable to the section in question, the plaintiffs must prove damages they had suffered, erred in saying further [at p 156] that, 'unless the sum ... is a genuine pre-estimate'. It must be remembered that the expression 'liquidated damages' is the name for the contracting parties' supposedly genuine pre-estimate of the loss to the innocent contracting party when the contract is broken by the other. Every such provision to which the section in question is applicable is to be regarded effectually as a penalty and is therefore void or unenforceable.

The Indian Supreme Court in two leading cases adopted the view of Lord Atkin in *Bhai Panna Singh v Bhai Arjun Singh* that a plaintiff must prove the actual damage, ie he must prove the damages for the actual damage or loss, despite those words in question. The two Indian Supreme Court cases are cases in which the interpretation of this section in question was not a sideshow as in most of other cases mentioned, but was the main prominent issue discussed and dealt with. It will be necessary to set out the gist of them.

The first of these two cases is *Fateh Chand v Balkishen Das* [1964] 1 SCR 515; AIR 1963 SC 1405. This case concerns a sale of land for the price of Rs121,500. Rs1,000 was paid as earnest money. A part payment of Rs24,000 was further paid, whereupon the possession of the land was given by the vendor to the purchaser. The section in question was the issue before the court.

The case was heard before a subordinate judge and on appeal against his decision to the High Court, the High Court allowed the appeal and held that the purchaser was in breach of contract for failing to pay the balance of the purchase price. There was a clause providing for forfeiture

of all money paid for breach by the purchaser. The High Court however, ordered the purchaser to pay only a sum equivalent to 10% of the purchase price as reasonable compensation under the section in question in addition to and apart from the forfeiture of the sum of Rs1,000 being earnest money paid on signing the agreement. The High Court made also orders for payment of mesne profit for use of the land and for redelivery of premises of the land to the vendor.

The Supreme Court of India held that reasonable compensation should be awarded 'to make good loss or damage which naturally arose in the usual course of things or which the parties knew when they made the contract, to be likely to result from the breach'. It cannot be lost on the mind of anybody that the Indian Supreme Court was reasserting the celebrated ratio in *Hadley v Baxendale* (1854) 9 Exch 341; [1843-60] All ER Rep 461. The Indian Supreme Court further found the award of the sum equivalent to 10% of the purchase price by the High Court as being an arbitrary assumption based on no principle they could find. The Supreme Court then went about their way to ascertain apparently, the reasonable compensation by looking at the evidence to find if there was any loss other than the loss suffered by being kept out of possession. The Supreme Court found no evidence of depreciation of the value of the land in question there. The Indian Supreme Court found that there was absence of proof of damage, but stated that the forfeiture of earnest money and the advantage of having the earlier use of Rs24,000 as being sufficient compensation. The Indian Supreme Court, therefore did not in effect and in reality award any distinctly and separately 'reasonable compensation' under the section in question, despite what might be regarded as a mere consolatory statement just mentioned, with the greatest respect.

The ratio of the case seems to be that such 'reasonable compensation' must be proved according to the usual principles, and the court undertakes a consideration of the evidence adduced to see if there is any such proof or such evidence of such actual damage or loss. If there is no such evidence, there will be no award of such reasonable compensation. This ratio seems to be in accord with the view of Lord Atkin set out above.

The second case is *Maula Bux v Union of India* [1970] 1 SCR 928. There, Bux agreed to supply certain foodstuffs to some military headquarters and deposited Rs18,500 with the Indian Government. The contract provided that for failure by Bux to perform it, the sum of Rs18,500 'would stand forfeited and be absolutely at the disposal of the Government without prejudice to any other remedy or action that the Government may have taken'.

Bux failed to perform the contract and the sum of Rs18,500 was forfeited. Bux sued for the return of the sum. The subordinate court ordered the return on the ground that the Government had not suffered any loss. The Government appealed to the High Court. The High Court allowed the appeal and allowed the Government to retain the sum on the ground that the sum might be regarded as earnest money. Bux appealed to the Supreme Court. The Supreme Court disagreed that the sum was earnest money and held to the effect that the sum was not a reasonable

A amount as earnest money, so that the sum would fall within the section in question. The Supreme Court ordered the refund to Bux of the sum with the interest at the rate of 3% from the date of action to the date of satisfaction. *Fateh Chand v Balkishen Das* [1964] 1 SCR 515; AIR 1963 SC 1405 was clearly affirmed.

B With regard to the words in question, the Supreme Court held that the Government must prove the loss and thus could have produced but failed to produce evidence to prove the prices of the said foodstuffs in question when Bux failed to deliver them.

But what is far more interesting in that case is that the Indian C Supreme Court, when referring to the words in question, ie 'whether or not actual loss or damage was proved to have been caused thereby' stated that the words in question were intended to cover two kinds of contracts. In the first kind, the court would find it very difficult to assess such reasonable compensation. In the second kind, the court could assess such reasonable compensation with settled rules. Such dichotomy of contracts D by the Indian Supreme Court represents, in our view, a logical basis for the words in question, words added by the legislature to the section in question without seemingly any thoughtfulness about the desirability of some appropriate limitations thereto. We agree with the Indian Supreme Court's dichotomy of such contracts.

E Secondly, we therefore further hold that the words in question, viz 'whether or not actual damage was proved to have been caused thereby', are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss, as distinct from or opposed to all other cases, when a plaintiff in each of them will have to F prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

However, there remains to be done further work, for their Lordships in the Indian Supreme Court did not further identify or elaborate the contracts of the kind for the breach of which the court finds it difficult to assess damages or 'the reasonable compensation' for actual loss or damage. G The search will have to continue for the precise attributes of this kind of contract.

Conceivably, the archetype of cases of the kind just mentioned, in our view, is undoubtedly the well-known case of *Chaplin v Hicks* [1911] 2 KB 786 ; [1911-13] All ER Rep 224. In that case, Ms Chaplin, H an actress agreed with Hicks, a theatrical manager, for Ms Chaplin to be at a meeting for him to interview her and also 49 other actresses where he would select 12 out of such 50 actresses for giving remunerative employment to. He was in breach of contract for not giving Ms Chaplin a reasonable opportunity to attend the interview. It was also argued for him in the I Court of Appeal that only nominal damages were payable, and the award for substantial damages by the High Court was wrong. The submission of nominal damages was to the effect that she would have had only a chance of one in four of being successful. The argument for nominal damages was rejected by the Court of Appeal and the High Court's award was upheld.

Very clearly, Ms Chaplin failed to prove the damages for the actual damage, ie the amount for such damage or loss, and one may query as to why she should be given substantial damages and not merely nominal damages, as would have been seemingly and normally the case. We feel we ought to explain even further below.

A few words may first be necessary to explain the nature of nominal damages, which are damages of, say RM10 (traditionally of about 40 shillings in England), which could be awarded in each and every breach of contract, in the absence of actual loss or damage, inherently in such a case, or alternatively in the absence or failure of proof of such actual loss or damage.

To revert to the poser above about Ms Chaplin, basically, the evidence in Ms Chaplin's case indubitably suggested a real loss, a loss that was not too remote, going by the rules in *Hadley v Baxendale* (1854) 9 Exch 341; [1843–60] All ER Rep 461, but at the same time it was quite difficult to assess the damages or the amount of money that should be given to her for such loss of such opportunity to be selected.

In a good number of cases, rules for quantifying amounts of money for damages have evolved in courts for some but not all types of cases, in other words, a measure of damages for some of these cases has been respectively established, eg the measure of damages in a sale of goods being the difference between market value and contract price, etc. However, a measure of damages, ie a settled rule for assessing damage, has not been developed for cases of the type of Ms Chaplin's, and such measure for her case has still not been established. It would still be left to the good sense and fair play of the court to fix a reasonable amount as compensation. Thus, it will mean that for lack of an established measure of damages in any particular case, that case will be one in which the court finds it difficult to ascertain the amount of actual loss or damage. The court will not shirk its duty, however, when such actual loss or damage is manifested from the evidence and it is not too remote, to find a reasonable sum for the plaintiff.

It is significant to add that there are cases of contract in which the evidence therein shows there can be no real loss inherently, and in such event, nominal damages will be the only damages for a judgment obtained by a successful plaintiff either to use it 'as a peg to hang his costs on', or to establish a right or a declaration of right. It is not difficult to imagine such a case when the evidence shows clearly there can be no real loss.

For an illustration of such a case clearly showing no real damage or loss where nominal damages would be the only remedy, let us say, eg that A, a doctor promises to examine the next day, B, a regular patient of his, who is very keen to have A examine him routinely on the following day, and A fails to do so the next day. Here A is in breach of contract; but the evidence here clearly shows no actual loss or damage. Whether in any particular case the evidence shows any real damage or not, appears to be largely a matter of common sense.

Thirdly, therefore, we hold that the precise attributes of such contracts in which it is difficult for a court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable,

A and yet the evidence clearly shows some real loss inherently and such loss is not too remote; then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the court's good sense and fair play.

B Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages, despite the words in question.

C Having expressed our views above, we now deal with the facts in the instant case before us. The evidence shows clearly some actual loss, damages for which could be assessed by settled rules. The purchaser, eg was using the medical equipment. This is, therefore, a case where damages could be proved by settled rules. But the vendor has brought no D evidence to prove damages for the actual loss as explained earlier, so that we could have awarded at least some damages as compensation for loss of use of the medical equipment from some evidence of its rental value should it be rented out. Thus the real damage cannot be quantified. In other words, the damages have not been proved. The sum of RM96,000 paid towards the purchase price, less the sum comprised therein which was E paid as earnest money, would have to be refunded to the purchaser by the vendor subject to what is to be further said below about the sum representing the earnest money or the deposit.

Apart from the real loss (which has not been proved), the vendor ought to be entitled, in any event, to forfeit any reasonable amount of F earnest money or deposit. We have in our case, the deposit or earnest money, ie the sum of RM12,000 which was paid on signing the agreement by the purchaser to the vendor, see cl 1(a)(i) of the agreement. The sum is equivalent to 10% of the purchase price and is part of the said sum of RM96,000 sought earlier to be forfeited by the vendor under cl 1(a)(i) of G the agreement.

The sum of RM12,000, in all the circumstances of this case, is not too large to prevent it from being fully forfeitable. We would not interfere with it, and would allow the vendor to forfeit it or keep it.

We therefore allow the appeal in part by ordering the respondent to H refund forthwith the sum of RM96,000 less the sum of RM12,000, ie to refund the sum of RM84,000 and to pay 8%pa as interest thereon from the date of judgment to the date of satisfaction. The order of the High Court below dated 8 November 1991 is to be varied accordingly, to take account of the said refund and interest thereon. The respondent is to pay the costs of appeal here but costs in the court below remain payable by the appellant.

I *Order accordingly.*

Reported by Prof Ahmad Ibrahim